

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 13, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP836**

**Cir. Ct. No. 2011CV617**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MANITOWOC COUNTY BOARD OF ADJUSTMENT,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Manitowoc County:  
JEROME L. FOX, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. The Manitowoc County Board of Adjustment granted Rebecca Rach a variance from the shoreline setback requirement to construct a patio. The State of Wisconsin appeals the order of the circuit court

affirming the Board's decision, arguing that the evidence did not support the Board's decision. We disagree and affirm the order.

¶2 In 2010, Rach built a house on Wilke Lake in the Town of Schleswig. She later purchased another piece of land to the west (at the back) of the residence on which the Town built a road giving four lake residents access to a main road. The remainder of that parcel is swamp land. Rach then petitioned the Board for a variance to construct a 4' x 50' walkway and, at issue here, a 40' x 40' patio adjacent to a concrete porch on the east side of her house, facing the lake. The patio would intrude forty-nine feet into the seventy-five-foot required shoreland setback. Rach contended that without the variance she would suffer an unnecessary hardship because there was no other place on her lot to construct a patio. She indicated that the patio would be constructed of paver bricks spaced so as to allow filtration and landscaped to provide a vegetative buffer.

¶3 After Board members conducted an on-site inspection of Rach's property, the Board held a hearing on her request. She and her husband appeared in person and presented a landscaping plan showing that the patio would be constructed with materials and plantings to aid in filtration and catch any runoff. The Town indicated via letter that its board and planning commission both approved Rach's variance request. The Wisconsin Department of Natural Resources, by a letter from a shoreland zoning specialist, opposed the application, citing the lack of unnecessary hardship, the absence of unique property features, and the negative effects the patio and widened walkway encroachment would have on the lake.

¶4 Rach's husband testified that they had come before the Board prior to building their house; that they could not have built their house further back

because the land behind their house came up for sale only after they built; that the road behind their house was built wide enough to accommodate fire trucks, which before could not get to all of the cottages; and that, with the remainder of that parcel being wetland, there is “absolutely no room back there” to build a patio. A Board member commented, “I don’t think [the DNR shoreland zoning specialist] realized that.... He wasn’t there [at the property].”

¶5 The Board concluded that Rach faced an unnecessary hardship because the swamp area behind the house is not suitable for a patio; the landscaping, the substrate and the spacing between the pavers would handle runoff; and the variance would not be contrary to the public interest because the landscaping would screen the patio from the lake, beautify the shoreline and create a buffer to prevent runoff. The Board modified the variance request by reducing the width of the walkway from forty-eight to forty-two inches and the length of the patio from forty feet to twenty feet, thus cutting the setback intrusion to twenty-nine feet. The Board voted to approve the variance as modified. The State filed a complaint in the circuit court for certiorari review under WIS. STAT. § 59.694(10).<sup>1</sup> The court affirmed the Board’s variance decision. The State appeals.

¶6 On certiorari review, we review the Board’s decision, not the circuit court’s. *Roberts v. Manitowoc Cnty. Bd. of Adjustment*, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499. Our review is limited to considering whether: (1) the Board kept within its jurisdiction; (2) the Board proceeded on the correct theory of law; (3) the Board’s action was arbitrary, oppressive, or unreasonable, and represented its will rather than its judgment; and (4) the evidence was such

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

that the Board reasonably could have reached the determination it did. *Id.*, ¶11. The State challenges the fourth prong, sufficiency of the evidence.

¶7 On certiorari we apply the substantial evidence test to determine whether the evidence is sufficient. *Clark v. Waupaca Cnty. Bd. of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Roberts*, 295 Wis. 2d 522, ¶28 (citation omitted). This test is highly deferential and we may not substitute our view of the evidence for that of the Board. *Clark*, 186 Wis. 2d at 304. The Board, not the reviewing court, determines the weight and credibility of the evidence. *Delta Biological Res., Inc. v. Board of Zoning Appeals*, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991). A reviewing court must accord a presumption of correctness to the Board’s decision. *State ex. rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401.

¶8 When a landowner requests an area variance, the Board must decide whether denying the variance would impose an unnecessary hardship on the landowner not justified by the ordinance’s underlying purpose. *Id.*, ¶19. Unnecessary hardship must be based upon conditions unique to the property itself rather than considerations personal to the property owner and cannot be self-created. *Id.*, ¶20.

¶9 Because the State argues that Rach failed to produce sufficient evidence of “unnecessary hardship,” the State must overcome the presumption of correctness accorded to the Board’s decision. *See Arndorfer v. Sauk Cnty. Bd. of Adjustment*, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991). The State contends that any hardship Rach faces is self-created and personal to her because she built

the house just a year before applying for the variance, choosing its size and where to situate it on the lot. The State also contends that a patio is not essential in the first place and if Rach wants one she can build it, instead of a garage, at the back of the house. Even if Rach could construct the patio on the swampy land away from the lake, substantial evidence exists to support the outcome the Board reached, making it irrelevant that substantial evidence might exist to support the opposite outcome. **Roberts**, 295 Wis. 2d 522, ¶32. In addition, that argument ignores that building the patio behind the house would leave Rach in the position—disagreeable in Wisconsin—of having no garage.

¶10 The State argues that the aerial photograph Rach produced to show the unique swampiness of her property relative to her neighbors is too blurry to establish anything. The photo also does not discredit the claim, however, especially considering the Board members’ on-site viewing. We do not evaluate evidence anew or reweigh the evidence the Board found credible.

¶11 The Board must evaluate the hardship in light of the purpose of the zoning restriction at issue, and a variance cannot be contrary to the public interest. **Ziervogel**, 269 Wis. 2d 549, ¶20. The basic purpose of a shoreland zoning ordinance “is to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands.” **Just v. Marinette Cnty.**, 56 Wis. 2d 7, 10, 201 N.W.2d 761 (1972). The Board considered the purpose of the ordinance. After viewing the site itself, taking testimony and receiving input from the Town and the DNR, it modified the scope of the requested variance by imposing conditions designed to protect the shoreland setback zone. It specifically found that, as modified, the construction would not be contrary to the public interest.

¶12 The Board acted within the authority entrusted to it by the legislature. *See* WIS. STAT. § 59.694(7)(c). We conclude that the Board's decision is supported by sufficient evidence and that the State has not overcome its presumptive correctness.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

